No. 514.

IN THE

Supreme Court of the United States

October Term, 1944.

THOMAS HENRY ROBINSON, JR., - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR REHEARING ON AFFIRMANCE OF CONVICTION AND JUDGMENT.

THOMAS HENRY ROBINSON, JR., Pro Se,
Petitioner.

ROBERT E. HOGAN,
Louisville, Ky.,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

STATUTES AND CODE SECTIONS INVOLVED.

ALPHABETICAL LIST OF CASES.

IN THE

Supreme Court of the United States

October Term, 1944.

No. 514.

THOMAS HENRY ROBINSON, JR., - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR REHEARING ON AFFIRMANCE OF CONVICTION AND JUDGMENT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT.

Although this Court, on January 15, 1945, granted certiorari limited to two questions, one of which was: "Whether the death penalty was intended to be inflicted regardless of the time when inflicted or the degree of injury inflicted," yet the majority opinion of March 5, 1945, affirming, does not expressly decide whether injuries inflicted by the kidnaper antecedent to the denounced act of *transportation of an already kidnaped person* are to be considered in determining whether or not the death penalty may be imposed.

POINT No. 1. Judicial Enlargement of a Criminal Act by Interpretation Is at War With the Fundamental Principle That Crimes Must Be Defined With Appropriate Definiteness. And There Are No Constructive Offenses.

The Act in question denounces as a crime simply the TRANSPORTATION IN INTERSTATE COMMERCE of a person who has already been kidnaped. It does not denounce KIDNAPING, a State offense. Kidnaping is an offense under the laws of Kentucky, punishable by confinement in the penitentiary for life, or by death. Section 435.140 of Kentucky Revised Statutes, provides as follows:

> "(1) Any person who, forcibly or otherwise, holds another against his will to unlawfully obtain a ransom for his release, or who aids or abets any person thus offending, shall be punished by confinement in the penitentiary for life, or by death."

Congress nowhere in the Act defined the term "kidnaped," nor did it even slightly intimate that antecedent injuries inflicted during the commission of the State offense of kidnaping were to be reckoned with or considered in determining whether the death penalty should be imposed. *The majority opinion of this Court has left unanswered that question*—a question moreover upon which this Court granted certiorari.

A reference to the Act in question readily reveals that Congress intended to punish "Whoever shall knowingly TRANSPORT in * * * interstate com-

merce, any person who shall have been unlawfully * * * kidnaped * * * and held for ransom * * *," thereby pitching the whole offense upon the act of TRANSPORTATION in interstate commerce.

From the legislative history comes the revealing fact that by Senate Report No. 534, Mr. Stephens, from the Committee on the Judiciary, submitted the following:

> "In addition, this bill adds a proviso to the Lindbergh Act to the effect that in the absence of the return of the person kidnaped, and in the absence of the apprehension of the kidnaper during a period of 3 days (later extended to 7 days), the presumption arises that such person has been TRANSPORTED in interstate or foreign commerce, but such presumption is not conclusive.
>
> "I believe that this is a sound amendment which will clear up border-line cases, justifying Federal investigation in most of such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this act."

That quotation convincingly establishes that Congress was concerned chiefly and *only* with the interstate transportation of one who had been already kidnaped, and for that reason a three-day absence (later extended to seven days) of the person kidnaped was to create a presumption of TRANSPORTATION in interstate commerce. It plainly, and just as convincingly, demonstrated that Congress was not in the least concerned

with kidnapings, state offenses, or with the degree or amount of force wielded by the kidnaper in subduing his victim. In this instance, the Kentucky laws, and in other instances other State laws, are adequate in affording protection to its citizens and punishment for the guilty. If petitioner, in the case at bar, had struck his victim over the head with an iron pipe, or otherwise injured her, in the act of kidnaping, and had held the victim captive in Kentucky for, shall we say, thirty days, the kidnaping and beating and injuring would be strictly a State offense, even though there might arise a rebuttable presumption, after the lapse of seven days, that there had been an interstate transportation of an already kidnaped person. It could not be successfully maintained under those circumstances that the Federal offense of transportation had been violated.

Also, if after the lapse of thirty days or any number of days the kidnaper should decide to move his victim from Kentucky to another State, and did so, then, for the first time, would the Federal law come into play, and the kidnaper would then become amenable to the denounced act of transporting in interstate commerce an already kidnaped person. It would necessarily follow, and this example is cited to show that no matter what degree of force he may have exerted in subduing the victim, violence forms no part of the denounced act of transportation of one already kidnaped, and this Court, in the majority opinion, failed to decide that question, although it granted certiorari on that point.

Furthermore, judicial enlargement of a criminal act by interpretation is at war with the fundamental principle that crimes must be defined with appropriate definiteness. There are no constructive offenses, and before one can be punished, it must be shown that his case is plainly within the statute. *Fasulo* v. *United States,* 272 U. S. 620; United States v. Resnick, 299 U. S. 207; United States v. Chase, 135 U. S. 255.

There are no words in the language of the Lindbergh Act, nor in the legislative history of the Act, which even intimate that prior acts resorted to in subduing a victim who may be later transported in interstate commerce are to be included within the purview of the statute. The statute is simply an interstate transportation act. If there be any doubt as to that, all that is necessary is to consult Section 408b, Title 18, United States Code, which defines the term "interstate or foreign commerce." The Act is silent upon antecedently inflicted injuries, all of which gives rise to the suggestion that Congress did not intend to include any acts of violence which the kidnaper resorts to before the transportation from one State to another is actually engaged in. The Act may not be stretched by judicial decision to include any acts not plainly within its purview.

This Court, in the case of *Pierce* v. *United States,* 314 United States, 237, in an opinion by Mr. Justice Reed, a case incidentally from the Sixth Circuit, had for consideration the question of whether the statute making it an offense to falsely impersonate an officer or employee of the United States, included within its

scope false impersonation of officers of the Tennessee Valley Authority, a Government corporation. The Act as originally passed did not include officers of Government-owned corporations, but by a later amendment did include them. The opinion dealt with the situation existing before the amendment. This was said in that opinion:

> "These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. *Cf.* Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888, and cases cited. While the act should be interpreted 'so as * * * to give full effect to its plain terms,' Lamar v. United States, 241 U. S. 103, 112, 36 S. Ct. 535, 538, 60 L. Ed. 912; United States v. Barnow, 239 U. S. 74, 36 S. Ct. 19, 60 L. Ed. 155, we should not depart from its words and context."

Furthermore, there are no common-law offenses against the United States, and, in construing Federal statutes, courts must generally assume, in the absence of plain indication to the contrary, that Congress did not make the application of a Federal Act dependent upon State law. In the case of *Jerome* v. *United States*, 318 U. S. 101, 63 S. Ct. 483, in an opinion by Mr. Justice Douglas, Jerome was convicted of violating 12 U. S. C. A., Section 588-b, by entering a national bank in Vermont with intent to utter a forged promissory note,

the utterance of a forged promissory note being a felony under the laws of Vermont, but not under any Federal statute.

That case is comparable because kidnaping is a felony under Kentucky law, but is not under any Federal statute, and the Lindbergh Act does not incorporate the Kentucky offense of kidnaping.

The opinion had this to say:

> "We disagree with the Circuit Court of Appeals. We do not think that 'felony' as used in section 2(a) incorporates state law. * * * *But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.* * * *
>
> "Since there is no common law offense against the United States (citing cases), the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained (citing cases). That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

"There is no plain indication in the legislative history of section 2(a) that Congress used 'felony' in a sense sufficiently broad to include state offenses. * * *

"In the second place, Congress defined in section 2(a) robbery, burglary, and larceny but not felony. We can hardly believe that having defined three federal offenses, it went on in the same section to import by implication a miscellaneous group of state crimes as the definition of the fourth federal offense. In this connection it should be noted that when Congress has desired to incorporate state laws in other federal penal statutes, it has done so by *specific* reference or adoption. The omission of any such provision in this Act is a strong indication that it had no such purpose here."

The State offense of "kidnaping" is not defined in the Lindbergh Act. The thing which was aimed at, "interstate or foreign commerce," is specifically defined. In failing to define "kidnaping," it must be assumed that Congress did not intend the State offense of "kidnaping" to form any part of the act of transportation in interstate commerce of a person who had already been kidnaped, because, if it had, it would have done so by specific reference or adoption, as pointed out by the Jerome opinion. Likewise, it must be assumed that Congress did not intend any acts of assault incidental to the State offense of kidnaping to form any part of the transportation in interstate commerce. And, as further pointed out in the Jerome case, since there are no common-law offenses against the

United States, the administration of criminal justice under the Federal system has rested with the States, except as criminal offenses have been *explicitly* prescribed by Congress. Nor should this Court be unmindful of the principle that criminal statutes are always *strictly* construed; that there are no constructive offenses and before one can be punished, it must be shown his case is *plainly* within the statute.

Lastly, where Congress is creating offenses which duplicate or build upon State law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute. This Court should be reluctant to expand the offense denounced by the Lindbergh Act to include any Act which duplicates or builds upon the Kentucky State law denouncing kidnaping. For that reason it should not include any act of violence incidental to the State offense of kidnaping, which would necessarily, and should, exclude the striking of the victim with an iron pipe. As the striking by this petitioner of his alleged victim with an iron pipe was an impelling influence upon this Court in its decision to affirm, and as that factor should be eliminated in determining whether or not the death penalty should have been imposed, this Court is behooved and beseeched to withdraw its opinion affirming the judgment and conviction and to render one reversing this case.

POINT No. 2. Court's Instruction on Whether to Impose Death Penalty Inconsistent and Unlawful.

The Court, by its instructions (1500-1518, T. R.), permitted the jury to determine whether or not to recommend the imposition of the death penalty. The opinion of this Court, page 1, states that this Court granted certiorari limited to the sole question of the Court's statutory authority to impose the death sentence. Therefore, the Court's instruction on that point would come within the purview of that question. The pertinent part of that instruction appears on page 1517 of the Record, as follows:

> "Keep in mind, therefore, that if your verdict should be one of guilty, that you have the further duty of deciding whether or not you shall recommend to the court punishment by death. Whether or not such a recommendation should be made calls for an exercise by the jury of discretion and an evaluation of mitigating circumstances. It would be your duty to determine whether the defendant, in view of all the circumstances surrounding the commission of the crime, merited the death penalty. In exercising this privilege whether or not such a recommendation should be made, YOU ARE NOT BOUND BY RULES OF LAW, but will make your own appraisal of the character of the conduct of the defendant as evidenced by his acts which were related to the commission of the crime with which he is charged."

That charge to the jury, which told them that they were not bound by any rules of law in determining

whether they would recommend that the death penalty be imposed, was not only inconsistent with other portions of the instructions, but entirely nullified all other instructions favorable to petitioner.

It simply turned the jury loose to recommend the death penalty according to the jury's whim and fancy without furnishing any guide by which it might or might not recommend such a penalty. Instructions of the Court are the law by which juries are guided. To charge a jury that they are not bound by any rules of law upon the most serious aspect of the case, the forfeiture of life, should not be countenanced. Petitioner is not unmindful of the rule that no complaint will usually be heard when no exceptions are taken to the Court's instructions. Petitioner is likewise mindful of the rule in United States v. Atkins, 297 U. S. 157; and in United States v. Dressler, 112 F. (2d) 972, 976, that appellate courts may, of their own motion, notice errors to which no exception has been taken, if they are obvious or seriously affect the fairness and integrity of judicial proceedings. This case is one calling for the application of that rule.

POINT No. 3. Minority Opinion Correct.

Mr. Justice Rutledge has written a very strong, persuasive dissenting opinion, in which Mr. Justice Murphy has joined. That dissenting opinion points out vividly, and with logic, the inconsistency of the majority opinion. Particularly, does it show that Congress, by not making clear its intention, has placed upon the Courts the burden of "guessing" what it

meant. This case, in which petitioner's life is to be forfeited unless this Court intervenes by recalling its former opinion and rendering one reversing, should not be grounded upon the uncertainty of this Court's guess as to what Congress intended. The majority opinion states that it is not clear what was intended, and yet the Court has proceeded to guess away this petitioner's life. Such important things as the forfeiture of petitioner's life should not be left to rest upon such an uncertainty.

CONCLUSION.

This Court is earnestly implored to give to this case the earnest and serious consideration it so rightfully deserves, and to withdraw its opinion affirming; and to render one reversing this case.

Respectfully submitted,

THOMAS HENRY ROBINSON, JR., PRO SE,
Petitioner.

ROBERT E. HOGAN,
Louisville, Ky.,
Counsel for Petitioner.

Petitioner hereby certifies that in his judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

THOMAS HENRY ROBINSON, JR., PRO SE,
Petitioner.

ROBERT E. HOGAN,
Louisville, Ky.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 514.—October Term, 1944.

Thomas Henry Robinson, Jr., Petitioner, vs. United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 5, 1945.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner was indicted and convicted in a District Court for violating the Federal Kidnapping Act, 47 Stat. 326, 48 Stat. 781, by transporting in interstate commerce a person whom he had kidnapped and held for a reward. The jury recommended and the court imposed the death penalty. The Circuit Court of Appeals affirmed, 144 F. 2d 392. We granted certiorari limited to the sole question of the court's statutory authority to impose the death sentence.

The Act authorizes the death sentence when recommended by a jury "provided that the death sentence shall not be imposed by the court if prior to its imposition, the kidnapped person has been liberated unharmed." The indictment charged, and there was evidence before the jury, to the effect that the kidnapping victim yielded to capture only after the petitioner had twice violently struck her on the head with an iron bar; that while held in custody her lips were abrased and made swollen by repeated applications of tape on her mouth, and that wounds resulting from these assaults were not healed when she was liberated after six days captivity. No evidence was introduced, nor did the indictment charge, that the injuries inflicted were permanent, or that the victim still suffered from them when the petitioner was sentenced, nine years after commission of the offense.[1] The trial court charged the jury that in determining whether the victim had been "liberated unharmed" they were limited to a consideration of her condition at the time she was liberated, and that they were not authorized to recommend the death penalty if at the time of her liberation she had recovered from her injuries. Petitioner took no exception to the charge, and asked no other. Its correctness is before us only to the extent that we are asked to say that

[1] Petitioner pleaded guilty to the offense in 1936. In August, 1943, a district court held his plea of guilty invalid on the ground that he had been denied counsel. This appeal is from a trial which took place in October, 1943. See Robinson v. Johnston, 118 F. 2d 998; 316 U. S. 649; 130 F. 2d 202; 50 F. Supp. 774.

the injuries inflicted must be permanent or they must be in existence at the time of sentence in order to authorize the infliction of the death sentence.

The scant legislative history of the Act is of little assistance to us in interpreting this proviso. Two possible reasons suggest themselves, however, as to the motivation of Congress in making the severity of a kidnapper's punishment depend upon whether his victim has been injured. The first reason is the old belief that the severity of the injury should measure the rigor of the punishment. If this be the reasoning implicit in the statute, it would appear that Congress intended that for a kidnapper to obtain the benefit of the proviso he must both liberate and refrain from injuring his victim. Congress may equally have intended this provision as a deterrent, on the theory that kidnappers would be less likely to inflict violence upon their victims if they knew that such abstention would save them from the death penalty. This assumptions finds some slight support in the legislative history,[2] is not contested by the government, has been accepted in one case[3] and is the chief prop for the interpretation which the petitioner urges. He argues upon this assumption that the wider the scope of the exemption from the death penalty, the greater the inducement for the kidnapper to release the victim. To magnify the inducement, we are asked to interpret the proviso as granting immunity from the death sentence to any kidnapper who does not permanently injure his victim. We cannot expand the meaning of the statute on such a hypothesis and we turn to its language.

We accept the word "unharmed" appearing in the proviso as meaning uninjured. Neither the word "permanent" nor any other word susceptible of that meaning was used by Congress. The quality of the injury to which Congress referred is not defined. It may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which Congress had in mind. We need indulge in no speculation in regard

---

[2] When the original kidnapping bill was passed by the Senate it did not provide for a death penalty. The House Committee on the Judiciary reported it to the floor with an amendment which authorized a death penalty unless the jury recommended mercy. 75 Cong. Rec., Part 12, 13294. Considerable opposition to the death sentence developed in the ensuing debate, *Ib.* pp. 13282-13304. Some of the opposition rested on the argument that the death penalty would cause kidnappers to kill their victims rather than release them because of fear that a liberated victim could send a kidnapper to the electric chair. *Ib.* pp. 13285, 13304. The bill as passed did not authorize the death penalty. 47 Stat. 326. Two years later an amendment was passed containing the present proviso. 48 Stat. 781. Its legislative history throws no additional light on its purpose.

[3] United States v. Parker, 19 F. Supp. 450, 103 F. 2d 857.

to such a category. The injuries inflicted upon this victim were of such degree that they can not be read out of the Act's scope without contracting it to the point where almost all injuries would be excluded. We find no justification whatever for grafting the word permanent onto the language which Congress adopted.

Nor can we construe the proviso as precluding the death sentence where the kidnapped person's injuries have been healed at the time sentence is imposed. It is not to be assumed that Congress intended a matter of such grave consequence to defendants and the public to turn on the fortuitous circumstance of the length of time that a case is pending in the courts. Far too many contingencies are involved, for example, the time it takes to apprehend a criminal, the condition of the trial docket, and the uncertainties of appeals. We would long hesitate before interpreting the Act so as to make the severity of sentence turn upon the date sentence is ultimately imposed, even if the language of the Act more readily lent itself to such a construction than this one does. At the very least, the proviso's language must mean that the kidnapped person shall not be suffering from injuries when liberated; the kidnapped person here was still suffering from her injuries when liberated.

Nevertheless it is argued that the death penalty proviso should be held invalid on the ground that there is uncertainty as to the precise meaning and scope of the word "unharmed" and the phrase "liberated unharmed." In most English words and phrases there lurk uncertainties. The language Congress used in this Act presents no exception to this general truth. One thing about this Act is not uncertain, and that is the clear purpose of Congress to authorize juries to recommend and judges to inflict the death penalty, under certain circumstances, for kidnappers who harmed their victims. And we cannot doubt that a kidnapper who violently struck the head of his victim with an iron bar, as evidence showed that this petitioner did, comes within the group Congress had in mind. This purpose to authorize a death penalty is clear even though Congress did not unmistakably mark some boundary between a pin prick and a permanently mutilated body. It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all. We do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congres-

sional purpose in regard to hypothetical cases that may never arise.

The trial court committed no error of which this petitioner can complain.

Affirmed.

Mr. Justice RUTLEDGE, dissenting.

The penalty of death should not be imposed upon conditions defined so uncertainly that their identity cannot be ascertained or is left open to grave doubt. If words ever need to be clear, they do when they perform this function. I do not know what Congress meant when it commanded that "the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed." 48 Stat. 781.

The words have the sound of certainty which simple, everyday language gives forth. The certainty is only illusion. What does "liberated unharmed" mean? The statute does not tell us. Nor does the legislative history.[1] Neither does the Court's opinion. It rather demonstrates the statute's ambiguity. It does not say what Congress meant. It says only that Congress meant one of two things, and either would cover this case.[2] A third possible construction, put forward by petitioner, is rejected. The statute, it is held, does not mean that the death penalty can be imposed only when the injuries inflicted are permanent or, presumably, only when they remain at the time of sentence, though not permanent. The Court does not say what "liberated" means. Nor does it define "unharmed," except that it excludes the injury inflicted in this case.

What act is pointed to by "liberated"? Does it refer only to release by the kidnapper or does it include a case of rescue overcoming his will and purpose? Does it cover his abandonment of the victim in flight, leaving him perhaps gagged and bound in some lonely spot or cell, not free but no longer in the kidnapper's power? Or must he, before the pressures become too great, change his mind, exercise discretion and set the victim free before he is forced to do so?

---

[1] The Government's brief candidly states: "The interpretation of the proviso here involved must be determined from the face of the statute itself since neither the legislative history nor prior state legislation offers guidance." No hearings were held on the 1934 amendments, providing for the death penalty. They were accepted upon conference reports by both houses without debate. H. Rep. No. 1595, 73d Cong., 2d Sess.; 78 Cong. Rec. 8775, 8856-8857. Neither H. Rep. No. 1595 nor H. Rep. No. 1457, 73d Cong., 2d Sess., gives light on the meaning of the limitation.

[2] Cf. note 3.

Similarly, what is "unharmed"? A scratch, a cut, abrasions left by removal of tape or rope, bruises, nervous shock, disturbance of digestion, all of a kind which heals or passes before "liberation" occurs? Few kidnappings take place without harm of some kind to the victim. They may be executed by force or by mere threats. One produces traumatic injury, from minor abrasion to death, the other nervous or mental shock of momentary or lifetime duration. How much injury, and what kind, did Congress have in mind?

Is the death penalty to be imposed for the identical cut or abrasion, whether minor or serious, inflicted during the act of taking the victim, merely because in one case the kidnapper releases or abandons him quickly, perhaps because forced to do so, but forbidden in another because he holds the victim until the injury heals? Is reward thus to be given for prolonging the agony?

Is the jury to range throughout the category of human ills, not only to find that injury has been inflicted but to evaluate whether those ills are "injuries" within the meaning of the statute? Or is this a question of law to be determined by the judge upon some vague criterion of "trifling nature" such as the opinion appears to suggest? Whether Congress meant all injuries, slight, substantial, serious or permanent, or only some of these, the statute does not say and the legislative history gives no guide. The judge, or the jury, or both together not only must apply, they must determine and write the law in this respect, until at any rate this Court, equally without legislative guidance, tells them what Congress had in mind.

There are still other uncertainties. Was it the intent (1) that the kidnapper must both liberate and refrain from injuring his victim or (2) merely that he must not inflict harm, however the liberation may occur? We are not told what was Congress' purpose, whether to measure the rigor of the punishment by the severity of the injury or to induce kidnappers not to use violence at all, deterring them by the threat of death for its use in whatever degree.[3] Neither the legislative history nor the opinion gives light on this question. If Congress wished to induce gentle kidnappings, injuries inflicted in the course of the act of kidnapping are covered, provided they remain at the time of "liberation."

[3] At one point the opinion declines to express a choice between these possible alternatives. At another it states "the clear purpose of Congress" was to authorize "the death penalty under certain circumstances for kidnappers who harmed their victims." Is this to be taken as deciding that "liberated unharmed" means "liberated not having been harmed at all"? If so, the Court's view differs from the Government's, which is that the

They would not be included, if healed before it, however grave when inflicted or however distant liberation from infliction. What if the kidnapper, knowing that time is crucial, keeps his victim until the injuries are healed? Was it Congress' purpose to induce longer detention, the more serious the injury inflicted during the original act? What if it is inflicted afterward, but during the course of the detention? Once injury has taken place, the inducement held out by the statute necessarily is either to hold the victim until cure is effected or to do away with him so that evidence, both of the injury and of the kidnapping, is destroyed.[4] The more serious the injury the stronger these inducements. It is only upon such considerations, affecting the victim's safety, that Congress' qualification of the power to impose the sentence of death can be accounted for.[5]

---

words mean "unharmed at the time of liberation." Cf. note 5. Moreover, the opinion, if so effective, invites for the victim the very danger Congress sought to avoid by placing the limitation upon the power to impose the sentence.

[4] These considerations for the safety of the victim, recently dramatized by the Lindbergh case, were influential in bringing about the omission from the original Kidnapping Act of 1932 (47 Stat. 326) of any provision for the death penalty. Representative Cellar stated them thus:

"If you insist upon the death penalty, I wager that you will inflict a penalty on the victim who is kidnaped. The victim may be murdered or slain because the prisoner [sic] has nothing to gain by the victim being kept alive, because he forfeits his own life, in any event. . . . The person kidnaped is the witness who, even when rescued, can always point the accusing finger at the guilty. Doing away with the victim would save the life of the guilty." 75 Cong. Rec. 13285. See 75 Cong. Rec. 13282-13304 for other statements opposing the extreme penalty.

From the viewpoint of possible effectiveness in securing the victim's safety, the qualification imposed by the 1934 Act would seem to be directed more toward the kinds of danger Congress had in mind during the 1932 debate than toward preventing all use of force in the kidnapping act itself. Cf. note 5 and United States v. Parker, 19 F. Supp. 450, affirmed, 103 F. 2d 857, cert. denied, 307 U. S. 642.

[5] The Government has urged adoption of the construction which takes account of these considerations. The brief states:

"The words 'liberated unharmed' . . . are subject to two interpretations. They may be construed to mean liberated without having been harmed at any time in the course of detention, or . . . liberated in an unharmed condition at the time of liberation. The first construction attributes to Congress the intention to cause kidnapers not to harm the victim but without tending to secure liberation of a victim who has been harmed. The second construction offers the kidnaper an inducement, in addition to the inducement not to harm, to care for and to cure an injured victim so that he may be unharmed when liberated. The second construction encouraages kidnapers not to murder an injured victim, an inducement not present under the first construction. *In view of the temptation to kidnapers to murder their victims in order to dispose of witnesses to their crime, and in view of the interest disclosed in Congress to avoid a death penalty provision which would encourage this result,* the Government submits that the second construction *more properly reflects the intention of Congress* and should be adopted." (Emphasis added.)

Finally, was Congress attempting to offer the maximum inducement to liberation? If this was the purpose, petitioner's construction, rejected by the Court, has more force than the other possible ones among which it declines to choose. For in that event the kidnapper would have inducement, once injury is inflicted, though serious, to surrender the victim in the hope that care after surrender might bring about cure before imposition of sentence. If the single and vague word "unharmed" is construed to mean absence of permanent injury or grave injury, though not permanent, he would have the hope, the inducement that surrender might give escape from the maximum sentence. Contrary to the Court's view that this interpretation is impossible, it goes directly to the unanswered questions, how much and what kinds of injury Congress had in mind; and to adopt it would accord with the rule that criminal statutes should be strictly construed. Moreover it would apply in this case, since there is no evidence of permanent injury or even that the injuries inflicted were critical at the time of the victim's release. She testified at the trial.

It is true this construction would make imposition of that penalty depend upon fortuitous circumstances, the length of time between release and sentence, as well as the chances of the victim to recover and their successful working out in that period. But any other construction either makes it depend upon circumstances equally fortuitous or has the inevitable effect, in many cases, of holding out inducement to the kidnapper to inflict the ultimate harm rather than to refrain from inflicting harm at all. Petitioner's construction more than any other takes into account the victim's safe surrender. Once the victim is hurt, the kidnapper's problem of what to do with him becomes inescapable and the provision for the extreme penalty can work only to defeat or defer liberation. Was this what Congress intended, knowing that few kidnappings can occur in which some substantial harm will not be done?

I doubt that Congress intended these consequences. I do not know from its words what it did intend. The opinion does not enlighten me, except that this case is one of possibly many, vaguely indicated, which may have been in mind. Congress has broad power to prescribe penalties for crime, including death. It may give wide discretion to courts in selecting from a broad range of defined penalties to fit the individual case. Within limits this discretion may include the death penalty.

It is one thing however for Congress to confer the discretion confined by specified and ascertainable limits. It is another thing

for Congress itself to turn the exercise of the conferred discretion upon conditions which cannot be ascertained from its mandate or can be located only with the greatest uncertainty.

Two things are clear. Congress did not intend the death penalty to apply to all convictions under the statute. Nor was its imposition intended to rest absolutely or exclusively either upon the jury's recommendation or in the court's discretion. The purpose obviously was to forbid it in some cases. But these can be determined only by choice among conflicting inferences which set one purpose Congress may have had in mind at war with others equally attributable to it.

This case involves the law's extreme penalty. That penalty should not rest on doubtful command or vague and uncertain conditions. The words used here, for its imposition, are too general and unprecise, the purposes Congress had in using them too obscure and contradictory, the consequences of applying them are too capricious, whether for the victim or for the kidnapper, to permit their giving foundation for exercise of the power of life and death over the citizen, though he be convicted criminal. Other penalties might be rectified with time, if wrong. This one cannot be.

Moreover, the Court's refusal to resolve the statute's admitted ambiguity leaves hanging over the heads of future victims the danger which flows from "a death penalty provision which would encourage" the same irreparable fate for them. When that fate falls it will not be "hypothetical" and there will be nothing either we or Congress can do to revoke it.

I think the statute turns the power to impose the death penalty upon facts so vaguely defined that only judicial legislation can remedy the defect. This is not the kind of thing courts should be left to work out case by case through the "gradual process of inclusion and exclusion." This business rather belongs to Congress, not to the courts. As the Court's opinion states, though I think in contradiction of its judgment, "It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all." Congress' mandate in such matters must be clear; otherwise we, not Congress, decide. In this one it is beyond understanding.

I would vacate the judgment and remand the cause for the petitioner to be resentenced.

Mr. Justice MURPHY joins in this opinion.